The Supreme Court of the United States.

WASHBURN & MOEN MANUFACTURING COMPANY

v.

THE RELIANCE MARINE INSURANCE CO.

In Petition for Writ of Certiorari.

BRIEF OF THE PLAINTIFF IN SUPPORT OF PETITION FOR CERTIORARI.

STATEMENT OF THE CASE.

As the petition in this case states the facts quite fully and also the reasons why in the opinion of the petitioner a writ of *certiorari* should issue to the United States Circuit Court of Appeals for the First Circuit, this brief will merely discuss the questions of law and such questions of facts as may be interwoven therewith.

It seems only necessary to state in connection with the facts stated in the petition that there was evidence presented to the jury that the cargo of barbed wire insured aboard of the schooner "Benjamin Hale" was valued in the policy in the sum of $48,800. That the said schooner struck a rock off the Florida Keys, filled with water and sank, so that the wire became entirely submerged. That while the vessel and cargo were both submerged and apparently never could be saved, the insured made an abandonment in due form to the Insurance Company. That afterwards the property was saved, brought to Key West and put in a place of safety. That the cost of saving the property, together with the expenses incident to the same, amounted to more than the value of the wire after it was

saved. That the property was afterwards forwarded by the Insurance Company in another vessel to the port of destination, and that by reason of that action a lien was incurred which resulted in the sale of the property by judicial process and thereby its loss to the plaintiff. That there was evidence before the jury that the property after being wet in salt water was of no commercial value. That the loss occasioned by perils of the sea alone amounted to more than one-half the value of the property as fixed in the policy. That the plaintiff never exercised any acts of ownership over the property after the abandonment was made by it, and it is claimed that sufficient evidence was introduced to warrant the jury in finding that there was an acceptance of the abandonment by the Insurance Company.

That the Circuit Court ruled, and this ruling was affirmed by the Circuit Court of Appeals, that the question as to whether or not there was a total loss either absolute or constructive, or whether or not there was an acceptance of the abandonment, was something which the jury could not pass upon. The plaintiff contended that they were questions of fact to be submitted to the jury. In other words, the Courts both ruled that on all the evidence in the case there was not sufficient evidence to warrant the jury in finding that there was a total loss under the insurance policy or that the Insurance Company was in any way liable for the amount sued for.

ARGUMENT.

The question presented is: Was the plaintiff, on all of the evidence in the case, entitled to recover for a total loss of the cargo under the terms of the policy issued by the defendant company?

It is agreed by the defendant that it could recover but for certain clauses in the policy. The plaintiff contends that there was sufficient evidence to entitle it to recover on either of three grounds:—

1. That there was a constructive total loss of the cargo and a seasonable abandonment.

2. That on the evidence the jury would be entitled to find that there was an absolute total loss.

3. That on the evidence the jury would be entitled to find that there was an acceptance of the abandonment.

I.

That there was a constructive total loss.

This requires a consideration of what is a constructive total loss of cargo and when it is to be applied.

The Doctrine of Constructive Total Loss.

There are two rules as to what is a constructive total loss under a policy of marine insurance.

1. The English rule is that, in the case of a vessel, if the amount of repairs caused by perils insured against is more than her value, or in the case of cargo, if the cost of saving and forwarding the same amounts to more than the value of the same at the port of destination, then, if there is an abandonment seasonably made, there can be a recovery for a total loss.

2. The rule in the United States in the case of both vessel and cargo is that, if the damage by perils insured against is in excess of one-half of the value, and an abandonment is seasonably made, there is a constructive total loss.

This doctrine was first laid down in this form in Massachusetts in 1810 by C. J. Parsons in

Lincoln *v.* Kennebec Ins. Co., 6 Mass. 479.

This doctrine was first applied to the case of cargo by the Supreme Court of the United States at a later date.

If, therefore, in the case at bar there were no restrictive clauses, there could be a recovery for a constructive total loss, as the abandonment was seasonably made.

The only clauses which could govern are either the clause in the body of the policy, where all kinds of wire, etc., are "*warranted free from average unless general*," and the clause in the rider, "Free from particular average, but liable for absolute total loss of a part, if amounting to five (5) per cent." Which clause of course supersedes the clause contained in the body of the policy.

In England, where the rule relating to constructive total loss is as above stated, it has been held that in a policy of insurance containing either of the clauses, "Free of partial loss," "Free of particular average," "Against total loss only," and "Against average unless general," the plaintiff can recover for a constructive total loss, provided there is an abandonment duly made.

In the case of Farnsworth *v.* Hyde, L. R. 2 C. P. 204, the Court held that there was a constructive total loss of cargo even under the English rule, provided the cost of saving the property, together with the extra freight of carrying the same forward, and other expenses, amounted to more than the value of the cargo (less the original freight) at the port of destination.

In Roseth *v.* Alliance Mar. Ass. Co., 11 C. B. 176, approved in the above case, the cargo insured was a cargo of wheat with a memorandum clause, "Warranted free from average unless general."

The Court there used the following language, p. 190:—

"To determine this question, the jury must ascertain the cost of unshipping the cargo, the cost of drying and warehousing it, the cost of trans-shipping it into a new bottom, and the cost of the difference of transit, if it can only be effected at a higher than the original rate of freight. Add to these items the salvage allowed, in proportion to the value of the cargo saved, and the loss will be total, if the aggregate exceeds the value of the cargo at Liverpool, the port of discharge."

Reiner *v.* Ringrose, 6 Exch. 263–267, was insurance on a cargo of corn, the policy containing the warranty "free from average."

"It was suggested, and we all think that the suggestion is well founded, that it would have been a total loss if the corn had been in such a state in the port of Norway as that, when brought home, it could not have been sold for an amount exceeding the expenses of drying and bringing it home. And this is so, for it proceeds upon the same principles which make it a total loss if the expense of repairing and bringing home a ship would exceed the value when brought home." (In this case there was no salvage service.)

That the words "against total loss only" includes a constructive total loss, see

Adams *v.* McKenzie, 32 L. J., N. S. 92.

The rule in England being that there is a constructive total loss of vessel, provided the cost of saving and repair amounted to more than the value of the vessel after repair, and, in the case of cargo, that the cost of saving it and reshipping it and sending it forward amounts to more than its value at the original port of destination, provided an abandonment is duly or seasonably made.

It is true that in an early case, that of Cocking *v.* Fraser, 4 Douglas, 295, Lord Mansfield used the following language: "Absolute destruction of the goods by the wreck of the ship" would amount to a total loss on articles insured "free of average," even at an intermediate port.

This case has, however, been overruled in England by the cases cited above and also by other decisions cited and explained in Arnould on Insurance (Perkins' Ed.), Vol. II, p. 1026.

Law in the United States.

The law in the United States, by a long list of decisions relating to both vessel and cargo, has been settled in this regard.

Under the usual form of policy the assured can recover for a constructive total loss of cargo, provided there has been an abandonment duly made, if the loss or injury sus-

tained amounts to fifty per cent of the value fixed in the policy, or provided the property will not bring fifty per cent of such valuation in case of cargo.

Kettell *v.* Alliance Ins. Co., 10 Gray, 144.
Delaware Ins. Co. *v.* Winter, 38 Penn. St. 176.
Patapsco Ins. Co. *v.* Southgate, 5 Peters, 604.
Moses *v.* Columbian Ins. Co., 6 Johns, 219.

In determining the damage or injury to the property the cost of saving the property, or raising it, if submerged and bringing into port, will be taken as a part of the damage or injury in order to make up the necessary fifty per cent.

Ellicott *v.* The Alliance Ins. Co., 14 Gray, 318.
Wallace *v.* Thames & Mersey Ins. Co., 22 F. R. 66 (by Mr. Justice Matthews late of U. S. Supreme Ct.).
Tudor *v.* New England Ins. Co., 12 Cush., 554.

In Ellicott *v.* Alliance Ins. Co., 14 Gray, 318, as to expense of raising etc., the Court says, p. 320:—

"But in either case the fact of a total loss is to be decided by the condition of the property at the time to which the abandonment relates. If, at that time, the vessel cannot be recovered and repaired at an expense not exceeding half her value, the right of abandonment exists, and the expense incurred by the underwriters afterwards are for the purposes of salvage, and cannot affect the change of property which the abandonment creates."

See also

Northwestern Trans. Co. *v.* Continental Ins. Co. 24 Fed. R. 171,

where the same rule was applied by Judge Brown, now of this Court.

There is nothing in this policy which calls for the application of a different rule.

The clauses, "Free of particular average," "Free of partial loss," "Free of average unless general," or "Again

total loss only," are all clauses of long standing and have the same meaning in the United States as in England.

If goods or vessels are insured in a policy containing any one of these clauses, yet if they are damaged to the extent of fifty per cent and there has been a seasonable abandonment, then the assured can recover for a total loss.

See where the words used were "Against total loss only."

Heebner *v.* Eagle Ins. Co. 10 Gray, 131.

"Free of partial loss."

Kettell *v.* Alliance Ins. Co., 10 Gray, 144.

"Free of partial loss."

Mayo *v.* India Mut. Ins. Co., 152 Mass. 172, 174–175.

The latter case was on a policy of insurance where the words used were "Free of partial loss," and where there was an abandonment of the cargo which afterwards arrived in the port of destination *in specie*, and very little diminished in quality.

The Court held that the plaintiff could recover a constructive total loss, as the loss was fifty per cent, and an abandonment was duly made before arrival.

In Heebner *v.* Eagle Ins. Co., 10 Gray, 131, the Court says that insurance against "total loss only" covers a case of *constructive total loss*. This case also deals with the construction of a policy signed by a president or secretary in another State, but signed or countersigned by an agent here, and decides that such a policy will be construed according to the law of Massachusetts.

Greene *v.* Pacific Ins. Co., 9 Allen, 217,

where the words were "against total loss only," on ship and whaling outfits the Court applied the same doctrine, and held that a total loss of outfits could be recovered, there being a total loss of the ship.

In Kettell *v.* Alliance Ins. Co., 10 Gray, 144, the words used were, "Against partial loss."

This was a case of tin plates where the cargo was

abandoned near the port of damage. Here a distinction is drawn between tin plates and the usual memorandum articles such as are perishable in their own nature.

The valuation in the case at bar is entire, and that must govern.

Pierce *v.* Columbian Ins. Co., 14 Allen, 320.

The words used are "Free of particular average," stated to be the same as "Against total loss only."

Gray, J., says, "And by the American law, if goods other than memorandum articles are injured by the perils of the sea to more than half their value, it is a constructive total loss, and authorizes an immediate abandonment and recovery against the insurers."

The learned circuit judge does not follow the reasoning of Judge Shaw in the case of Kettell *v.* Alliance Ins. Co. (*supra,*) (Record p. 139), and this is owing to the fact that he does not apply the term "memorandum articles" in the way that the term is commonly used, and as used by Judge Shaw in that case.

The terms "memorandum articles" and "common memorandum articles" have a well-known meaning in the law of marine insurance, as being "articles which are perishable in their own nature."

It was first introduced in Lloyd's policies in England in 1749.

The form of the "common memorandum" is found in all the old text-books on marine insurance.

The stipulation in use in this country is generally called the "common memorandum," and the articles enumerated in it are called "memorandum articles."

2 Arnould on Insurance, Perkins' Ed., 852, 856.

It was with the knowledge of the history, and the commonly understood use of the term, that Judge Shaw spoke of "memorandum articles."

The learned circuit judge, on page 139, says: —

"He undertook to make a distinction between the

articles found in the memorandum clause proper, and articles found in a rider."

This is not a correct statement, as an examination of the case shows that the word on which the defendant relied *was not in a rider*, but was in the body of the policy.

That the learned chief justice was speaking with a full knowledge of the subject we refer to his own language in that opinion, which is as follows;—

On page 152: "One reason given why a constructive total loss should not be made up of damage on memorandum articles, so as to allow of an abandonment for damage, was that in the case of mere damage it was so difficult to distinguish between that part of visible damage which proceeds from internal tendency to decay, and that part from perils of the sea, that it must have been the intention of the contracting parties to exclude it altogether. In this respect there is a marked difference between tin and brass goods liable to tarnish, and memorandum articles liable to decay.

On page 154: "We have not thought it necessary to review the English cases on this subject, many of which were cited in the argument, for the reason already given, that they all related to memorandum articles, and not, like this, to a specific exception of goods liable to particular damage, but not perishable in their nature, and not embraced in the common memorandum."

On page 155: "There is no adjudged case which holds that when such goods, liable to particular damage, but not to decay or destruction by sea water, are shipped and insured, with an exception of liability for the partial loss, and the goods are damaged to more than half their value by a sea peril, the goods left at an intermediate port, so that by the established rule of law here the assured has a right to abandon, and he does seasonably abandon, this is not a legal total loss, for which he may recover."

The same line of reasoning is given in the case of Mayo *v.* India Mutual Ins. Co., 154 Mass. 172, and Judge Gray (now of the Supreme Court of the United States) uses the words "memorandum articles" in the same way in Pierce *v.* Columbian Ins. Co., 14 Allen, 320.

The reason for such a distinction is clear; the common memorandum articles are those which are perishable in their own nature, or are such that in case of being in contact with water, or in case of delay, will deteriorate very fast, so that it is difficult to determine whether the loss has been occasioned by sea peril, by the nature of the article, or the delay of forwarding it.

The Circuit Court and the Circuit Court of Appeals for the First Circuit both find that, in the State Court of Massachusetts, the plaintiff could recover, but state that the Supreme Court of the United States has examined the question, arrived at a contrary conclusion, and that it is therefore bound by the decisions of this Court.

In support of this statement it cites four cases:—

Marcadier *v.* Chesapeake Ins. Co., 8 Cranch. 39.
Moreau *v.* U. S. Ins. Co., 1 Wheaton, 219.
Hugg *v.* Augusta Ins. Co., 7 Howard, 597.
Insurance Co. *v.* Fogarty, 19 Wallace, 640.

It is our contention that such is not the fact, as an examination of the cases will show.

Marcadier *v.* Chesapeake Insurance Co. (*supra*).

In this case, decided in 1814, where there was an attempt to recover a constructive total loss on the whole cargo, composed partly of goods that were perishable in their own nature, and written free of average, it was held that if the loss on the goods not covered by the above clause did not amount to a constructive total loss, at *the port of refuge*, that the loss on the memorandum articles, by reason of deterioration, could not be added in order to make a constructive total loss on the whole cargo.

The Court used the following language in its decision:—

"The underwriter is, in all cases of deterioration, entitled to an exemption from partial losses on the memorandum articles; and in order to effectuate this right, it is necessary, where a technical total loss is sought to be maintained upon the mere ground of deterioration of the cargo

at an intermediate port to a moiety of its value, to exclude from that estimate all deterioration of the memorandum articles."

"In this way, full effect is given to the contract of the parties. *The underwriter is never made responsible for partial losses on memorandum articles, however great; and the technical total losses, for which alone he can be liable, are such as stand unaffected by the perishable nature of the commodity which he insures.*"

"Admitting, therefore, the rule to be correct, that the party had a right to abandon where the depreciation exceeds a moiety of the value, the plaintiff has not brought himself within that rule, as applied to a cargo of a mixed character like the present." (*Supra.*)

The case of Moreau *v.* United States Insurance Company was an insurance on a cargo of corn, an article perishable in its own nature, and a common memorandum article. The vessel experienced heavy weather on a voyage from Baltimore to Lisbon. On December 19 the vessel was driven ashore at Lisbon. The cargo was wet, and was taken out and carried to Lisbon in lighters, and landed at Lisbon on the 22d of December, the cargo bringing less than half its invoice value. On March 11, 1813, the plaintiff offered an abandonment, which was refused by the insurance company.

In that case the Court says: —

"If the property arrive at the port of discharge, reduced in quantity or value, to any amount, the loss cannot be said to be a total in reality, and the insured cannot treat it as a total, and demand an indemnity for a partial loss."

"If the question turn upon the totality of the loss, unconnected with the subject of loss by deterioration of the cargo in value, or reduction in quantity, there is no difference between memorandum and other articles. If the loss be total in reality, or is such as the insured is permitted to treat as such, he is entitled to abandon and recover as for a total loss in the case of memorandum articles, but always with this exception, that he is not permitted to turn a partial into a total loss."

The two cases of Marcadier *v.* Chesapeake Ins. Co., 8 Cranch. 39, decided in 1814, and Moreau *v.* U. S. Ins. Co., 1 Wheaton, 219 (1816), we contend, do not apply to the case at bar for other reasons.

The dicta in these cases are clearly founded upon what the Court considered to be the English dictum as stated in Cocking *v.* Fraser (*supra*), and which doctrine has since been refuted by the English courts. For a discussion and history of this matter see 2 Parsons, Marine Insurance, 102.

These two decisions, however, are at most mere dicta. The abandonment in both cases was made too late, inasmuch as the insured property was not in peril, but had arrived at the port of destination when the abandonment was made.

So that even under the later decisions of the Supreme Court of Massachusetts the plaintiff could not have recovered.

Forbes *v.* Manf. Ins. Co., 1 Gray, 371.

The case of Hugg *v.* Augusta Ins. Co. (*supra*) was a case of insurance on the freight of a bark loaded with hides and jerked beef. The vessel received injury and was saved by salvors.

The freight policy contained a clause which made jerked beef "*free of average.*"

It was there held that there could be a recovery for a total loss of freight if the goods on the vessel were lost by any of the perils insured against.

In that case it is expressly stated that it is not the intention of the Court to pass on the question as to the respective rights of the owner of the cargo and its insurer.

The Court uses this language, viz.:—

"That, if the jury find that the jerked beef was a perishable article within the meaning of the policy, the defendants are not liable as for a total loss of the freight, unless it appears that there was a destruction in specie of the entire cargo, so that it had lost its original character at

Nassau, the port of distress; or that a total destruction would have been inevitable from the damage received, if it had been reshipped before it could have arrived at Matanzas, the port of destination."

The case of Great Western Ins. Co. *v.* Fogarty (*supra*) was insurance on a sugar packing machine "free from particular average," where parts of the machinery were lost, but more than one-half in amount and value was saved. "That which was saved was much broken and rusted, so that it would cost more to repair it, polish it, and put it in order for use, than to buy a new machine."

In that case there was a loss of more than fifty per cent of the value of the property prior to the arrival at the port of destination; but no abandonment was made until after the cargo was landed. The Court held that the plaintiff could not recover for a total loss, as the goods were not in peril when the abandonment was made. The application of the same rule to the two cases cited from the Supreme Court of the United States would cause the decisions to be the same as were rendered.

It is stated in Phillips on Insurance (5th ed., Vol. II, p. 316, § 614) that where in a policy goods are insured "free from average," according to all analogy and to be consistent the rule as to constructive loss should be the same as though the words were not used.

It is true that in the same work the law has been stated to be otherwise; but the book was published prior to the Massachusetts decisions above cited, and relies wholly upon the two cases, Marcadier *v.* Chesapeake Ins. Co. and Moreau *v.* U. S. Ins. Co.

In Marcadier *v.* The Chesapeake Ins. Co. (*supra*) the Court uses the following language, viz.: —

"It seems now clear that a technical total loss may arise from the mere deterioration of a cargo by any of the perils insured against, if the deterioration be ascertained at an intermediate port of necessity, short of the port of destination. In such a case, although the ship be in a capacity to perform a voyage, yet if the voyage be not worth

pursuing, or the thing insured be so damaged or spoiled as to be of little or no value, the insured has a right to abandon the projected adventure, and throw upon the underwriter the unprofitable and disastrous subject of insurance. *It has therefore been held that if a cargo be damaged in the course of the voyage, and it appear that what has been saved is less in value than the amount of the freight, it is a clear case of total loss.*"

In that case the Court gives its reasons why *common memorandum articles perishable in their own nature should be subject to a different rule.*

In this case the Court states that no rule seems to be established as to what constitutes a constructive total loss of goods, but recognizes the American rule as laid down by Chief-Justice Parsons in Massachusetts.

The doctrine of constructive total loss as applied to either cargo or ship had not been at that time fully developed in this country, as a careful reading of the above cases will show.

It is clear, therefore, that the cases in the Supreme Court of Massachusetts and in the Supreme Court of the United States are not in conflict, and that the rule established by both of these Courts can be thus briefly stated: —

That if the goods are insured "free of particular average," "free of partial loss," "against total loss only," or "warranted free from average unless general," there can be a recovery for a constructive total loss, provided there is a seasonable abandonment and a loss by perils insured against amounting to more than fifty per cent of the valuation of the goods insured.

That in case no abandonment is made until after the goods have arrived at the port of destination, the abandonment is not seasonably made, and the plaintiff cannot recover.

That in case of common memorandum articles perishable in their own nature, there can be no recovery for deterioration of the articles at a port of call or by mere delay in the

voyage, is all that the cases in the Supreme Court of the United States decide, and the Court in the decisions by express language clearly distinguishes between articles perishable in their own nature and articles not so perishable.

The cases in the Supreme Court of the United States were before Judge Shaw when he made his decision in the case of Kettell *v.* Alliance Ins. Co. (*supra*) as the report will show.

In the case at bar the articles are not memorandum articles and the loss was caused by perils of the sea, the abandonment was duly made at the time the goods were in peril, and the plaintiff should be entitled to recover for a constructive total loss which the jury found it had suffered.

The circuit judge states (Record, p. 138) :—

"The rule is an exceptional one, and against the general principles of underwriting. Nevertheless, there are these decisions of the Supreme Court which never have been modified by that Court as far as I can find."

II.

That it was a question of fact for the jury as to whether on all the evidence the defendant company had not accepted the abandonment.

It is true that the agent of the defendant company, on May 1, 1893, wrote a letter in which he declined to accept the abandonment.

Exibit 6, Record, p. 115.

He uses, however, these words in addition, "I await protest for particulars, after receipt of which can judge better regarding the loss."

Which clause shows that he desired to have the matter remain open.

An abandonment is to be governed by the facts existing at the time it is made.

This doctrine has often been stated by the Supreme Court of the United States.

Orient Ins. Co. *v.* Adams, 123 U. S. 67:

"That the abandonment of a vessel for a total loss, made in good faith at a time when it was in reasonable probability impracticable to recover and repair it, and when the damage by peril insured against amounted in all probability to fifty per cent, is a valid abandonment"; although it afterwards proved that the cost of repairs, etc., was less than fifty per cent.

In Marcadier *v.* Chesapeake Ins. Co., 8 Cranch, 39, J. Story says: —

"It now seems clear that a technical total loss may arise from the mere deterioration of a cargo by any of the perils insured against, if the deterioration be ascertained at an intermediate port of necessity, short of the port of destination." Again "It has therefore been held, that if a cargo be damaged in the course of the voyage, and it appear that what has been saved is less in value than the amount of the freight, it is a clear case of total loss."

But although an abandonment may be refused by the underwriter, it may be afterwards accepted by him, although the acceptance is taken wholly from acts which may be done from which the jury may imply acceptance.

In the case at bar the acts done by the defendant company are sufficient to warrant the jury in finding that there was an acceptance of the abandonment.

In Peels *v.* Merchants Ins. Co., 3 Mason, 27-85, Mr. Justice Story discusses what are acts of ownership which will amount to an acceptance of an abandonment. In Pheonix Ins. Co. *v.* Copelin, 9 Wall. 461, which was a case in point, the Court uses the following language: "It is well settled, however, that an offered abandonment may be accepted, even when the assured has no right to abandon, and, if accepted, it must be with its consequences, and an acceptance need not be expressly made. It may

even be refused, and yet the insurers by their conduct may make themselves liable for a total loss."

The question whether all the acts amount to an acceptance of the abandonment, is a question of fact for the jury.

See Richelieu & C. Nav. Co. *v.* Boston Marine Ins. Co., 136 U. S. 408.

The same doctrine is stated in

Northwestern Trans. Co. *v.* Continental Ins. Co., 24 Fed. Rep. 171 (by Judge Brown now of U. S. Sup. Court).

Here the insurance was against "total loss and general average."

The vessel was raised by the underwriters and tendered back to the owners. The abandonment was timely. Held, that on the facts there was an acceptance of the abandonment as a matter of law. Cited by approval in the former case.

In the case of Carr *v.* Security Ins. Co., 109 N. Y. 505, where the language was "against actual total loss only," the Court uses the following language: —

"The underwriters having elected to take possession of the vessel under the rescue clause, it is plain, we think, that they could neither sell the vessel voluntarily, nor permit it to be sold under judicial process, in satisfaction of a lien which they had created, without thereby making the loss to the plaintiff an 'actual total loss,' whatever may have been its original character. The sale under the decree in admiralty divested irrevocably the title of the plaintiff."

The facts in Munroe *v.* British Ins. Co., 5 N. S., Ap. 179–193, 52 Fed. Rep. 777, are entirely different.

In the case at bar the underwriters create a lien on the goods by sending them forward, — in fact, create a greater liability than the original charter, and for this lien the property was sold under judicial process.

The cases on which the defendant relies are not in con-

flict with the doctrine of Mayo *v.* India Ins. Co., 172 Mass., and the other cases cited there.

In the case of Munroe *v.* British Ins. Co. (*supra*), the words used are "against absolute total loss of vessel and animals only." But the words here are greatly different.

At Velasco this whole cargo sold for the sum of $10,000, so that the expense of saving the wire and bringing it to a port of sale, without counting the expense of discharging and selling the same, amounted to over $2,000 more than the cargo was worth as shown by the sale.

The plaintiff also produced as witnesses experts who heard all of the evidence in the case and who testified that this sum was much in excess of what the cargo was worth.

Parmalee, Record, p. 80, Int. 64.

And who testified that the cargo would be commercially worthless, as the wire would be destroyed for the purpose intended.

Parmalee, Record, p. 76.
Clements, Record, p. 84.
D'Ewart, Record, p. 83.

And they all testify that it would have cost more to recondition the wire than it would cost to make new barbed wire.

This is clear evidence not merely of a constructive total loss but of an actual total loss.

In England under the decisions this would constitute a case of actual total loss, as the cost of saving the property alone amounted to more than the property was worth after it was saved.

In the case of Crossman *v.* B. A. Ass. Co., L. R. 13 Ap. Cas. 161, in the Privy Council of England, which was a case where the property was sold by reason of perils insured against, the Court held that it constituted an actual total loss. The Court uses the following language, viz., p. 169:—

"It was admitted that no formal notice of abandonment

was given, and it is unnecessary, in the view which their Lordships take, to determine whether what took place between the owners and the underwriters substantially amounted to such notice. Their Lordships are of opinion that after the sale under the decree of the Court of Admiralty there was an actual total loss."

"To constitute a total loss within the meaning of the policy of marine insurance, it is not necessary that a ship should be actually annihilated or destroyed. It may, as in the case of capture and sale upon condemnation, remain in its original state and condition. It may be capable of being repaired if damaged. It may be actually repaired by the purchaser, or it may not even require repairs. If it is lost to the owner by an adverse valid and legal transfer of his right of property and possession to a purchaser by a sale under a decree of a court of competent jurisdiction in consequence of a peril insured against, it is as much a total loss as if it had been totally annihilated."

This case shows the extent to which the doctrine has been carried in England as to "An actual total loss."

III.

That there is sufficient evidence to warrant a jury in finding an actual total loss of cargo.

In the case at bar, the cost of saving the cargo and bringing it to Key West, a port of safety, amounted to the sum of $9,393.15, and there were further expenses in Key West, amounting to the sum of about $1,190, making the total expenses of saving the property over $10,500.

All of the witnesses called in the case testify that there was no market for the cargo at Key West.

Hanna, Record, p. 86.
Mareno, Record, p. 89.
Williams, Record, p. 92.

The cargo was shipped by the Schooner "Cactus," at an expense for freight of $1,498.50, and for demurrage at Key West of $175, which, without any allowance for de-

murrage at Velasco, Texas, amounts to the sum of $1,673.50, which was the charge necessary to bring the cargo to a port where it could be sold; and it is acknowledged by all parties that Velasco, Texas, was as good a place to sell a cargo of barbed wire as any place in the United States.

Rice, Record, p. 26.

In the case of Wallerstein *v.* Columbian Ins. Co., 44 N. Y. 240, where the cargo was insured "free of particular average only," and where the cost of saving the cargo amounted to more than its value after it was saved, the Court held that it was a case of actual total loss.

In the case of Bullard *v.* Roger Williams Ins. Co., 1 Curtis, 148, Judge Curtis says: —

"If you should find, from the evidence in the case, that the injuries suffered by this brig from perils were so great that they could not be repaired so as to make her a seaworthy vessel, except at an expense exceeding her value when repaired, then this was a case of actual total loss, and no abandonment was necessary."

The same doctrine is laid down in the case of Insurance Co. *v.* Fogarty, 19 Wall. 640, where parts of machinery were lost. Briefly stated the doctrine is this: —

If the use of the property insured, for the purpose for which it is made, requires an expenditure greater than the property is worth after that expenditure, then it is the case of an actual total loss, and no abandonment is necessary.

In other words, as in England, if the value of the property is absorbed by perils insured against, and the cost of preservation and saving of the same, as well as bringing it to the port of destination, is more than the value of the property when saved and at the port of destination, it is a case of an actual total loss, and no abandonment is necessary.

In the case at bar the value of the property at the port

of destination did not amount to the sums thus paid. See also, to this point,

Kinsman *v.* China Mutual Ins. Co., 49 Fed. Rep. 876.

And this doctrine is founded on what a prudent, uninsured owner would do under the same circumstances.

We submit that there is also evidence that at least the wire damaged did not arrive *in specie* adapted for the purpose for which it was intended.

The same doctrine has been stated in another form in the case of Williams *v.* Kennebec Ins. Co., 31 Maine, 455.

The case of Hugg *v.* Augusta Insurance & Banking Company, 7 Howard, 595, is a case on a policy of insurance on the freight of the bark "Margaret Hugg," and the doctrine there stated, except as to the cases previously cited, refers only to what would constitute a total loss of a freight policy. It cannot have any application to the case at bar, because the nature of insurance on cargo can be of no importance in a suit on a freight policy.

The sale in the latter case was a voluntary one, not made by the underwriters, but by the direct act of the consignee.

This doctrine was stated in the case of Stringer *v.* Eng. & S. Mar. Ins. Co., L. R., 4 Q. B. 671, by the Court. that a constructive total loss by legal process might be occasioned, either by acts of the assured, or by acts which arose from perils against which they insured.

In the case at bar, the underwriters not merely worked under the sue and labor clause, but after the property insured was in a place of safety, *and after the voyage was abandoned by the owners of the Schooner "Benjamin Hale."* The underwriters without in anyway notifying the plaintiff, transshipped the cargo on another vessel under a different charter, and forwarded it to Velasco, Texas, creating burdens upon it which did not before exist. This was clearly an act of ownership exercised by them without

notice, by which liens were created which they have never offered to assume or pay.

It was for the liens thus created that the property was sold under the process of a Court of Admiralty.

IV.

The contract should be governed in this case by the law of Massachusetts.

The contract in the case was made in Massachusetts, and should therefore be governed by the law of Massachusetts.

Pierce *v.* Columbian Ins. Co. (*supra*).
Equitable Ass. Co. *v.* Clements, 140 U. S. 226.

In the case of Smith *v.* Tyson, 16 Peters, 1, where the decision of the State Court was not followed, the cause of action being on a bill of exchange which was negotiable in its nature, Judge Story uses the following language:—

"Undoubtedly, the decision of the local tribunals upon such subjects are entitled to, and will receive, the most deliberate attention and respect of this Court; but they cannot furnish positive rules, or conclusive authority, by which our own judgments are to be bound up and governed."

In Jackson *v.* Eden, 12 Wheaton, 153, a case on the construction of a clause in a will, A. devised certain land to his sons in fee and then added to his will, "If either of my said sons should depart this life without lawful issue, his share or part shall go to the survivor," etc.

Per curiam: "After such a settled course of decisions, and two of them in the highest court of law in the State, upon the very clause in the will now under consideration, deciding that Joseph Eden did not take an estate tail, a contrary decision by this Court would present a conflict between the State Courts and those of the United States productive of incalculable mischief."

"It has been urged however, that this Court applies

this principle (that of following the State Court decisions) only to State constructions of their own statutes. It is true that many of the cases in which this Court has deemed itself bound to conform to State decisions, have arisen on the construction of statutes. But the same rule has been extended to other cases; and there can be no good reason assigned why it should not be, when it is applying settled rules of real property. This Court adopts the State decisions because they settle the law applicable to the case; and the reasons assigned for this course apply as well to rules of construction growing out of the common law, as the statute law of the State when applied to the title of lands."

This doctrine has been considered by Prof. Thayer in a late article dealing with this subject, where the following language is used: —

"But there is another ground for coming into the courts of the United States. A case may come there, as this one has, not because of any question arising under the Constitution or laws of the United States, but simply because the plaintiff and defendant are citizens of different States or countries. In such a case, the Court is administering the law of the State. In this sort of case, the general rule is, that since the Court is applying the law of the State, it will follow, in determining what that law is, and construing it, the decisions of the highest court."

"But there are various qualifications of these doctrines. The most conspicuous of them is the principle of Swift *v.* Tyson, 16 Pet. 1 (1842), in which the novel and much contested doctrine was laid down, that upon questions of what are called general commercial law, the courts of the United States did not undertake to follow the State Courts. This declaration was not required for the decision of that case, but it has been followed and is an established rule in the United States jurisprudence. Its soundness in point of principle is, perhaps, open to question; at any rate, it is undergoing much criticism at the present day."

J. B. Thayer, on the case of Gelpcke *v.* Dubuque, in 4 Harv. Law Rev. 311.

In the case at bar, under the rule of construction laid

down by the highest courts both of Massachusetts and England, these questions should have been submitted to the jury to determine whether or not there was a constructive total loss.

The case was brought in the State Court, and if the Federal Court should give a different construction to this contract, then there would be a conflict of laws within the same jurisdiction.

Such a conflict is unnecessary and does not now exist. The distinction between the decisions of the Massachusetts Supreme Court and those of the United States Supreme Court is clear and has been drawn earlier in this brief. That such a distinction is recognized we think a careful reading of the cases of Marcadier *v.* Chesapeake Ins. Co. (*supra*), and Moreau *v.* U. S. Ins. Co. (*supra*) will show. *This distinction is expressly spoken of in all of the Massachusetts cases cited.*

The rules of law contended for by the plaintiff are those that apply to both vessel and cargo.

To have this policy of marine insurance construed as asked for by the defendant and as stated by the United States Circuit Court of Appeals would enable insurance companies to save a part of a cargo of general merchandise and escape a loss, as it is a well-known commercial fact that a policy like the one at bar is the only kind of policy on this kind of goods that can be obtained.

The rule that, where the loss is merely by reason of the inherent nature of the article insured, there cannot be a recovery, has been fully established by the courts long since the decisions of this Court in Marcadier *v.* Chesapeake Co. (*supra*) and Moreau *v* U. S. Ins. Co. (*supra*).

But where the loss as in this instance is by reason of marine perils insured against there should be a recovery.

In the case at bar the cargo was a total loss in value when the vessel was ashore and filled with water.

The cost of saving the cargo was more than its value after it was saved.

THE PURPOSE OF THE SAVING AND FORWARDING OF THE CARGO TO THE PORT OF DESTINATION WAS NOT IN ORDER TO SAVE PROPERTY BUT TO PREVENT THE PLAINTIFF FROM RECOVERING HIS INSURANCE.

If this is the rule of law that is to govern in every case of stranding, all that will be necessary for an insurance company to do will be to save some part of the cargo and send it forward, no matter at what cost.

This surely is not the intention of such a clause as free from partial loss.

The decision is contrary to the rule of law laid down by the courts in Massachusetts and in England, the *only courts that have* passed on this question.

We submit that a writ of certiorari should issue to the United States Circuit Court of Appeals in this case.

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